Filed 3/30/05 P. v. Boutte CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yuba)

THE PEOPLE, Plaintiff and Respondent, v. DONALD STEVEN BOUTTE, Defendant and Appellant.	C043775 (Sup.Ct. No. CRF02487)

Defendant Donald Steven Boutte appeals from his convictions for spousal rape (Pen. Code, § 262, subd. (a)(1))[1] and assault (§ 240). He contends there was insufficient evidence to sustain his spousal rape conviction, as the evidence "established that the complaining witness first refused consensual sex, then withdrew her refusal." He also contends the order requiring him

---

[1] Unless otherwise indicated, further statutory references are to the Penal Code.

to submit to DNA testing, pursuant to section 296, violates his right to privacy and right to be secure against unreasonable searches and seizures. We disagree and shall affirm.

STATEMENT OF FACTS

While staying in the same motel as Cindy Martinez, J. Boutte locked her keys in her car. Martinez helped J. get in her car, and J. asked Martinez to join her and defendant, her husband, at the park for a few beers. On the way to the park, the trio bought some beer. At the park, Martinez built a fire in a barbeque bit which firefighters later came and put out.

After the firefighters left, J. and defendant began fighting. Defendant had become jealous because J. "was talking to the firemen more than [she] was talking to him." J. walked away from defendant, as he was becoming verbally abusive. Defendant pursued her, "grabbed her by the shoulders and turned her around, and then he actually picked her up and threw her." When defendant threw her, she "banged [her] head really hard." Although it was grass and she was 30 feet away, Martinez heard the "thunk" when J.'s head hit the ground.

J.'s blouse was ripped. When she tried to get up, she fell and "hit" her head again. J. had had a couple of sips of beer and a prescription medication, but denied that she was "under the influence." She did not appear to be intoxicated or unsteady. Prior to being thrown to the ground, she was not dizzy or disoriented.

Defendant then walked J. back to his car. Cindy walked away, back toward the motel, as defendant helped J. get in the

car. Defendant offered Martinez a ride, but she refused because he was being violent.

Defendant and J. then went to another motel. After they got to the motel room, J. went to bed. Defendant started fondling and kissing J., because he "wanted to have sex." In the course of their marriage, this was generally how defendant initiated sexual encounters with J. He never explicitly asked her if she wanted to have sex.

J. did not feel good, her head hurt, she was "real dizzy, disoriented, and kind of in shock." She did not want defendant to touch her, so she told him "no." J. had never before refused to have sex with defendant. After she refused to have sex with him, defendant sat on the edge of the bed, told her "he never met a woman that had frustrated him as much as me and he kicked a hole in the bathroom door."

Defendant came back to bed, began fondling and kissing J. again and had sex with her. She had not changed her mind about having sex with him, and she did not tell him she had changed her mind. She did not respond passionately to defendant, or respond at all, she "just laid there." She let defendant have sex with her, because she "was afraid he might do something to [her] to hurt [her] worse." She also did not resist because "[she] couldn't." Her "head was going -- it felt like [her] brain inside of [her] head was doing revolutions, and [she] was sick to [her] stomach."

Defendant had never been violent with J. before that day.

J. fell asleep shortly thereafter. She did not call for help. She also did not leave, because she was too dizzy. When J. woke up and defendant went to the car, J. called her friend Larry to come and get her.

Larry took J. back to his house. J. told Larry's wife, Ramona, what had happened and Ramona took her to the hospital.

As a result of being thrown to the ground, J. had bruises on her legs. She also sustained a concussion, but had no broken bones and a CAT scan was negative. J. told officers at the hospital that she had had nonconsensual sex with defendant and that she was afraid of him.

Prior to this incident, defendant and J. were not living together. They had, however, spent several weekends together at different motels. During each of those weekends, they had sexual intercourse. J. also admitted she was angry and upset because she believed defendant was having an affair.

After he was incarcerated, defendant wrote J. a letter apologizing for his "negative performances - behavior" toward her. He also requested J. speak to his parole agent "and convince him that the incident was an accident." He even provided her with an entire explanation for the parole agent, "We were together at the park. The weather was hot and we were both somewhat grumpy. We began quarreling and you broke for the highway. I did not want to leave you unattended as you take medications and it was dark in the evening with plenty of motorized vehicles in motion. I know this [*sic*] prescription drugs make you disorientated [*sic*] and so, to prevent a tragedy,

like getting yourself hit by a car, I advanced upon you. In my haste over your safety, I may have gripped your shoulder overly hard, causing you to tumble, fall and bump your head. [J.], I swear by God, that's the truth. You rarely drink baby. I know you had tipped a few. Combined with your medicine. . . . Do you see where I'm going with this my love? The alcohol in the beer was of a high content. Mingled with your drugs and emotional state at the time, I was faced with potential disaster. I had to do what was best for your well[-]being [J.]. That is my solemn word & what I was thinking when I went after you precious. You've got to believe that I would never deliberately hurt you."

PROCEDURAL BACKGROUND

On November 18, 2002, an amended information was filed, charging defendant with spousal abuse (§ 273.5, subd. (a)), and spousal rape. (§ 262, subd. (a)(1).) The information further alleged defendant had nine prior strike convictions (§§ 1170.12, subds. (b) & (c), 667, subds. (d) & (e), 1192.7, subd. (c)(1), 667, subd. (a)), and that defendant had suffered six prior convictions under the habitual offender statutes. (§ 667.71.)

On December 17, 2002, defendant admitted all the prior convictions. That same day, jury trial began.

The jury found defendant not guilty of spousal abuse, but guilty of the lesser included offense of assault. (§ 240.) They also found defendant guilty of spousal rape. Defendant was sentenced to an aggregate term of 120 years to life in prison.

In addition to various fines, he was also ordered to provide DNA samples pursuant to section 296.

DISCUSSION

I.

Defendant contends there was insufficient evidence to support his spousal rape conviction, because the record established that J. "first refused to have sex with her husband, then withdrew the refusal." We disagree.

"In reviewing a criminal conviction challenged as lacking evidentiary support, 'the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence--that is, evidence which is reasonable, credible, and of solid value--such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)" (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) We focus on the whole record, not isolated bits of evidence. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1203.) We presume the existence of every fact the trier of fact reasonably could deduce from the evidence that supports the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.)

Defendant has cited no authority, in which a victim "withdrew" her refusal. Nor has independent research revealed any. Instead, defendant relies on *In re John Z.* (2003) 29 Cal.4th 756 to support his reasoning that J. withdrew her refusal. In *In re John Z.*, the California Supreme Court held "the offense of forcible rape occurs when, during apparently

consensual intercourse, the victim expresses an objection and attempts to stop the act and the defendant forcibly continues despite the objection." (*Id.* at p. 760.)

Defendant contends his case presents the "opposite scenario" of *John Z., supra,* 29 Cal.4th 756, in that, he and J. "had been staying in local motels engaging in consensual sex; they did not verbally discuss or 'agree' to sex, but [defendant] would simply begin kissing and fondling her, after which they would engage in consensual intercourse; on June 30, [J.] said 'no,' for the first time, after which [defendant] stopped and got out of bed; when [defendant] returned to bed and began kissing and fondling her again, she did not say, 'no,' or communicate in any way, through words or conduct, that she was not consenting. [¶] Here, after initially refusing consensual sex, the complaining witness, through words or actions, effectively communicated her consent. Thereafter, a reasonable person in [defendant's] position would have believed that she was consenting to the act. [Citation.]" He contends that the corollary to *In re John Z* must also be true, "if the female, after initially refusing to consent, shows that she withdrew her refusal and, through her actions and words, communicated that fact to the defendant, then no reasonable person in his position would believe that she continued to refuse."

Although not laid out in the precise terminology of withdrawal of refusal, the essence of defendant's argument is already established law, that is, would a reasonable person in defendant's position believe he had the victim's consent.

(*People v. Mayberry* (1975) 15 Cal.3d 143.) In this case, the jury was expressly instructed on the *Mayberry* defense and rejected it. This rejection was supported by the record.

"The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent. [¶] In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable . . . ." (*People v. Williams* (1992) 4 Cal.4th 354, 360-361, fn. omitted.)

However, "a reasonable mistake of fact may not be found if the jury finds that such equivocal conduct on the part of the victim was the product of 'force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of another.'" (*People v. Williams, supra,* 4 Cal.4th at p. 364.)

"'[A]lthough resistance is no longer the touchstone of the element of force, the reviewing court still looks to the circumstances of the case, including the presence of verbal or nonverbal threats, or the kind of force that might reasonably induce fear in the mind of the victim, to ascertain sufficiency

of the evidence of a conviction under section [262, subdivision (a)]. 'Additionally, the complainant's conduct must be measured against the degree of force manifested or in light of whether her fears were genuine and reasonably grounded.'" [Citations.] "In some circumstances, even a complainant's unreasonable fear of immediate and unlawful bodily injury may suffice to sustain a conviction under section [262, subdivision (a)], if the accused knowingly takes advantage of that fear in order to accomplish sexual intercourse." (*Id.* at p. 304, fn. 20.) "'[T]he trier of fact "should be permitted to measure consent by weighing both the acts of the alleged attacker and the response of the alleged victim, rather than being required to focus on one or the other."' (*Id.* at p. 304.)" (*People v. Iniguez* (1994) 7 Cal.4th 847, 856.)

Defendant disregards some important evidentiary points in reaching his conclusion that he reasonably believed J. consented. These evidentiary points negate the reasonableness of his belief that she was consenting.

After defendant became jealous over the attention J. was paying to the firefighters, they argued with each other and he became verbally abusive. A ruckus ensued, he threw her to the ground, and J.'s head slammed into the ground. She had a concussion, was dizzy and nauseous and defendant had to help her back to the car. When defendant initiated sex and she refused, he sat on the edge of the bed, told her she was the most frustrating woman he had ever met and kicked a hole in the

bathroom door. Immediately after kicking the hole in the door, he returned to bed and reinitiated his sexual efforts.

We do not believe this record "establishes" that J. withdrew her refusal. To the contrary, she simply stopped resisting. She stopped resisting, because she was afraid defendant might hurt her "worse" and she felt sick to her stomach.

"'[I]n light of the totality of [the] circumstances' in [this] case, a 'reasonable juror could have found that [the victim's] subsequent compliance with' defendant's insistence on sexual intercourse 'was induced either by force, fear, or both, and, in any case, fell short of a consensual act.' [Citation.]" (*People v. Iniguez, supra,* 7 Cal.4th at p. 856.)

II.

Defendant next argues that the order compelling him to submit to DNA testing under section 296 violated his right of privacy and his right to be free from unreasonable searches and seizures. Defendant acknowledges that California courts have rejected constitutional challenges to DNA testing. (*People v. Adams* (2004) 115 Cal.App.4th 243, 255-259; *Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 505-506; *People v. King* (2000) 82 Cal.App.4th 1362, 1363-1364.) He contends, however, that these decisions were "called into question by *United States v. Kincade* (9th Cir. 2003) 345 F.3d 1095." After the opening brief was filed in this case, the Ninth Circuit vacated *Kincade* and ordered the matter reheard by the en banc court.

Defendant has put forth no additional authority which would persuade us to reconsider the existing California authorities on this point. "We [continue to] agree with existing authorities that (1) nonconsensual extraction of biological samples for identification purposes does implicate constitutional interests; (2) those convicted of serious crimes have a diminished expectation of privacy and the intrusions authorized by the Act [DNA and Forensic Identification Data Base and Data Bank Act of 1998 -- Pen. Code, § 295 et seq.] are minimal; and (3) the Act serves compelling governmental interests. Not the least of the governmental interests served by the Act is 'the overwhelming public interest in prosecuting crimes *accurately*.' [Citation.]" (*Alfaro v. Terhune, supra,* 98 Cal.App.4th at pp. 505-506, original italics.)

DISPOSITION

The judgment is affirmed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.